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December 20, 2001

Re: ***RM-10335***
Petition for Rule Making to Amend the Commission's Rules to Extend its Network and Non-network Territorial Exclusivity, Syndicated Exclusivity and Network Non-duplication Protection Rules to Low Power TV, Class A and Noncommercial TV Broadcast Stations.

Magalie Roman Salas, Secretary
Federal Communications Commission
445 12th St., SW, Room TW-A325
Washington, DC 20554

Dear Ms. Salas:

On behalf of Henry J. McGinnis, ("McGinnis") this is to provide Comments in support of the above-referenced Petition for Rule Making filed by Venture Technologies Group, LLC ("VTG") to amend Part 76 of the Commission's Rules to allow all television broadcast stations, whether low power, Class A or Noncommercial stations, to bargain for and exercise program exclusivity against other broadcast stations and cable systems.

McGinnis is the licensee of two low power television stations, KATA-LP and KJJM-LP. KATA-LP qualifies as a Class A Television station, and KJJM-LP has claimed that status, though its claim is disputed and remains pending. The Rule Making proposed by VTG would benefit McGinnis' stations in the same way as VTG's station in Syracuse, NY.

VTG requested that the Commission amend Sections 76.92 - 97, and 76.151-161 of the Rules; Mcginnis wishes to note that similar amendment would be required of Section 73.658(m) of the Commission's Rules, for consistency.

McGinnis agrees with the basic substance of the argument propounded by VTG for amendment of the rules to allow low power television stations and noncommercial stations to exercise the same exclusivity rights in their communities of license that are enjoyed by full-power television stations. VTG's arguments are especially apt in the wake of creation of Class

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A television stations pursuant to the mandate of the Community Broadcaster's Act. Class A television stations are expected to serve their communities of license in the same way as full-power stations, and were created to promote localism. Yet such stations, as noted by VTG, are often passed over for purposes of cable carriage in favor of importation of distant signals that would otherwise violate exclusivity rights were the affected station a full-power television station. This would not occur if low power television stations could exercise exclusivity rights against such imported signals.

As noted by VTG, amendment of the rules would serve the purposes behind the network non-duplication rules to protect local advertising and public service announcements provided by local stations within and adjacent to network programming. The rules also protect local stations and promote their viability in the competitive video industry. Such localism is not served by importation of distant signals.

Additionally, Class A and low power television stations originating programming often provide family and religious programming not provided by the major networks or full power television program, to meet the demands of local audiences for family-oriented, wholesome programming. Additionally, and unlike full power television stations, Class A televisions stations are *required to provide local programming* to their respective communities of license.[1] Thus, there is a special emphasis on local programming for Class A stations. Furthermore, the Community Broadcaster's Protection Act of 1999 stated that the FCC shall provide each Class A licensee "primary status" as a television broadcaster provided that the station continued tomeet the requirements for qualifying low power television stations. Yet, Class A and LPTV cannot exercise the same rights as full power stations to ensure their right to primary status, with respect to carriage of their programming on cable systems.

It should also be noted that, despite their right to primary status as television broadcast stations, Class A stations cannot demand cable carriage except under the same severe restrictive circumstances as ordinary LPTV stations, and that their local programming cannot be made available over cable systems to the stations' audience in their community of license.

The grant of exclusivity rights alone with respect to Class A stations will not resolve the problem of bringing local programming to the Class A station's market area unless, in addition to the protection provided by the amendments proposed by VTG, the Commission amends its must-carry rules to bring Class A television within the ambit of signals required to be carried by cable systems.

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[1]Community Broadcaster's Protection Act of 1999, (cite) section (1)(A) requires that low power television stations broadcast a minimum of 18 hours per day, and a minimum of 3 hours per week of programming produced within the market area served by the station.

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Technological advances have made it possible for most cable systems to carry in excess of 60 channels, but the existing must carry rules severely restrict the number of LPTV stations that are required to be carried by cable systems.[2] However, the context in which those restrictions were created has changed considerably since the passage of the CBPA and the creation of a Class A television service. Class A stations are no longer regarded as secondary signals. Congress and the Commission have recognized the importance of the local service provided by Class A stations, and has imposed new and significant responsibilities and duties on qualifying LPTV stations to ensure continuing service.

The Commission initially, and without further comment declined to make any changes in the requirements for mandatory carriage for Class A station in the original *Report and Order*, *Establishment of Class A Television Service,* 15 FCC Rcd 6355 (2000), ("*R&O*") p. 31, note 61. On reconsideration,[3] the Commission specifically declined to provide mandatory carriage rights to Class A TV stations, noting that Congress made no such mention of such rights in the CBPA, and had been silent on the issue.[4] However, McGinnis believes that the Commission did not sufficiently consider the issue, and that its decision in the *MO&O* was based on insufficient empirical evidence, and upon erroneous assumptions concerning the interpretation of its rules.

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[2]47 C.F.R. §76.55(d).

[3]*Memorandum Opinion and Order on Reconsideration, Class A Television Service,* 16 FCC Rcd 8244, (2001). ("*MO&O").*

[4]16 FCC Rcd. 8244, par. 39.

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Congress afforded the Commission discretion to effect regulations to provide that " . . . each such class A licensee shall be accorded *primary* status as a television broadcaster as long as the station continues to meet the requirements for a qualifying low-power station . . ."[5] (Emphasis added.) Regardless of the fact that power levels for Class A stations continue to be lower than that of higher powered television stations, *their status is no longer secondary*. They are regulated under Part 73 of the Commission's rules, rather than under Part 74, and they should be accorded similar primary rights with respect to mandatory carriage as other local commercial full power stations.[6]

The lack of must-carry rights puts Class A stations at a distinct economic disadvantage with respect to competition with other primary television stations. It is difficult to provide quality local service where economic viability is a constant issue. Class A stations enjoy few privileges other than protection of their signals from significant encroachment by full power stations. There is little *quid pro quo* for the increased responsibilities imposed by the Commission on these stations in return for their "primary" status. Class A stations must operate under the restrictions inherent in serving a smaller coverage area; this affects their economic viability, regardless of whether their signals receive greater protection than ordinary LPTV stations. As LPTV stations with enhanced protection, Class A's yet have little or no opportunities to improve programming by becoming network affiliates, and program providers have little reason to seek out Class A stations, since they provide limited coverage and are excluded from mandatory cable carriage. There is little in Class A coverage to attract quality, exclusive programming.

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[5]CBPA, section (f)(1)(A)(ii).

[6]In its *MO&O* on reconsideration, the Commission cited the definitions in the must-carry rules requiring cable carriage only for "full power" stations as cause for declining to afford Class A stations (as low-power stations) the same must-carry rights. However, the cable carriage rules were created *before* Class A television service, and the definitions cited by the Commission in no way can be considered to have taken the primary status of Class A stations into account to exclude Class A stations from coverage. The Commission's interpretation in its *MO&O* was a classic "Catch-22" situation. Nor is the fact that the Class A rules are "successor" rules to the LPTV rules in Part 74 relevant to the fact that Class A service must be considered separate and distinct from ordinary low power service.

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Class A's are stuck with minor network affiliations, or must secure individual programs as an independent provider. Even where, as set forth by VTG, Class A stations are able to obtain network affiliations, there is no way to protect that programming from duplication by cable systems. All of the foregoing disadvantages inhibit Class A licensees' ability to effectively serve the public. Economic viability would be improved by conferral of must-carry rights on Class A stations, where non-duplicative programming is offered, and where cable systems are large enough to accommodate such carriage. Certainly, Class A stations should not be prohibited from carriage simply because of service provided in their market areas by other full-power commercial stations. The goals of diversity of programming for the public would be enhanced by must carry-rights. The interests of localism in the purposes of the network non-duplication rules would be further served by adding this additional layer of protection for Class A stations.

Accordingly, McGinnis respectfully requests that any Rule Making to amend the Commission's Network and Non-network Territorial Exclusivity, Syndicated Exclusivity and Network Non-duplication Protection Rules should also explore whether to amend Section 76.55 of the Commission's Rules to include Class A television stations in the definition of "qualified local commercial television station", in order to afford Class A stations must-carry privileges on local cable systems.

Respectfully submitted,

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Counsel for Henry J.McGinnis

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